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# Written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[26 May 2014]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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# ASIA: Independence of judiciary, a mirage in South Asia

1. The arbitrary dismissal in January 2013 of the former chief justice of Sri Lanka, Dr. Shirani Bandaranayake, the first female Chief Justice in South Asia, reflects the independence of judiciary in the region. Though conditions prevailing in Sri Lanka are not exactly the same in the other South Asian countries of India, Nepal, Bangladesh, and Pakistan where the Asian Legal Resource Centre is engaged, the fact is that the judiciary in all these countries is reduced to an institution that is unable to independently deliver upon its mandate.

2. In Sri Lanka and Bangladesh, the judiciary has been reduced to a subordinate entity of the state, where the concept of separation of powers is at its lowest ebb if not absent. In India, though the judiciary is largely independent of executive control, its daily functioning is subjugated to the government, manifest in lack of adequate resources that have resulted in scandalous delay in adjudication. In Nepal, an acute situation exists, where even the appointment of judges and officers required for the judiciary to function meaningfully has not been done for the past four years. In Pakistan, the trend is on the upswing from abysmal depths, with the judiciary having begun to carve out some contours of fundamental independence, having been freed from six decades of military dictatorship.

3. The concept of independence of the judiciary is not a silo that depends upon the nature of the judges alone. Independence of the institution is also closely related to the legislative framework within which the judiciary is to act: the support the institution receives from the government; the cooperation that the judiciary seeks and obtains from other executive organs of the state, including the investigating agency; and the extent to which the institution is able to exercise its independent writ upon other institutions of the state, most importantly, in the South Asian context, upon the armed forces of the state.

4. Over the past decade, concerns of national security have substantially reduced the reach of judicial writ upon the organs of the state. Human rights abuses committed by state agencies, including arbitrary and or incommunicado detention, torture, and extrajudicial execution, are exempted by statute from judicial review in the region.

5. Furthermore, certain legislations provide for long periods of detention of persons without the possibility of being produced before a judicial officer. Governments pass most of these legislations, including amendments to the constitution, without public consultation. In all these countries such legislations have also contributed substantially to widespread disappearances, a serious issue upon which courts have the least influence.

6. In Sri Lanka and Bangladesh, amendments have been made to existing legislations that prevent the judiciary from reviewing state actions on the excuse of executive immunity. In India and Pakistan, state security legislations and special laws concerning armed forces of the state exempt judicial intervention in cases involving the armed forces and law enforcement agencies of the state. In Nepal, judicial writ is often ignored by the state, and the government intentionally fails to comply with judicial decisions.

7. Today, these states are clinically reducing the space for open criticism against state actions. Amongst of the worst affected are human rights defenders speaking on behalf of victims of human rights abuse. Draconian legislations, like the national security laws, allow the states to fabricate criminal charges against human rights defenders. And, the judiciary is increasingly finding no space to intervene, due to ouster clauses built into these legislations.

8. Equally important is the absence of accountability and transparency within the judiciary itself. Appointments, promotions, and transfers of judges are a closed process in all the above countries. It has resulted in genuine accusations of corruption and nepotism, most of which have failed to be investigated or acted upon.

9. In countries where judicial independence is seriously hampered, the concept of fair trial has no meaning. Constituting an independent judiciary is a political policy that state must evolve and resolve. Unfortunately, such a resolution is not anywhere close to fruition in South Asia.